UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Allstate Insurance Company, et al.,	Docket #CV-16-2802 (JFB)(AKT)
Plaintiffs,	
V.	United States Courthouse Central Islip, New York June 5, 2017 2:25 p.m.
Eastern Island Medical Care, P.C., et al.	
Defendants.	

TRANSCRIPT OF TELEPHONIC ORAL RULING
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

THE CLERK: Civil cause for an oral ruling in civil 16-2802, Allstate against Eastern Island, et al. Counsel, please state your appearances for the record.

MR. WITCHER: Good afternoon, this is Michael Witcher from Smith & Brink on behalf of the Allstate Plaintiffs. And I'm joined by Richard King, also of Smith & Brink, on behalf of the Allstate Plaintiffs.

MR. HARFENIST: And you have Steven Harfenist and Neil Torczyner on behalf of Eastern Island and Dr. Scott Roteman.

MR. SWIEDLER: Alan M. Swiedler on behalf of Defendants Luna and Vista, and also Summit Reality and Gary Stein in this action.

MR. LICATESI: Anthony Licatesi and Alan Elis on behalf of Dr. Michael Small and Optimum Marketing.

THE COURT: Okay, good afternoon, this Judge Bianco. As you know I scheduled the conference to place my rulings on the record with respect to the Motion for Preliminary Injunction filed by Plaintiff, as well as the Motion to Dismiss by Luna Management and Vista Billing Services, who I'll refer to jointly as the Luna Defendants, and the Motion to Dismiss filed by Eastern Island Medical Care and Dr. Scott Roteman, who I'll refer to jointly as the Eastern Island Defendants. I decided to do an oral ruling so as not to delay the case further, but you can order a copy. It should take

about 15 or 20 minutes to read this into the record, and if you want to order a copy of the transcript, you can do so through the Clerk's Office, and then obviously we can address any open issues when I'm done.

For reasons that I'll now explain in detail, I'm denying the motions, all the motions in their entirety. I'm going to start with the Motions to Dismiss. First with respect to the standard of review for a Motion to Dismiss, it's well settled, I won't belabor the record by stating it in any detail. I adopt the standard set forth in one of my recent opinions, Harbor Distributing Corp v. GTE Operations Support, Inc., 2016 Westlaw 1228615 at page 3 (E.D.N.Y. March 28, 2016). In particular, on a Rule 12(b)(6) motion, I accept the factual allegations set forth the complaint as true. I'm drawing all reasonable inferences in the Plaintiff's favor from those allegations and determining whether a plausible claim exists under the Iqbal Twombley standard as articulated by the Supreme Court. The Eastern Island Defendants raise four issues in support of their Motion to Dismiss. First, they argue Plaintiff's RICO causes of action fail to state a claim for which relief could be granted. Second, they argue that the RICO and fraud claims premised upon violations of New York's licensing requirements are barred by res judicata and collateral estoppel. Third, they state that the RICO and fraud claims fail to the extent they are based on a theory

that the services lacked medical necessity. And finally, they argue that RICO causes of action are partially barred by the Statute of Limitations. The Luna Defendants' motion is premised on the Statute of Limitations argument as applied to them, as well as the argument that the complaint fails because it does not allege any violations by them that occurred before they ceased doing business. For reasons I'll discuss in detail, I'm denying these motions because I don't believe that they can be resolved on a Motion to Dismiss standard with respect to the ones that argue the failure to state a claim or Statute of Limitations, and I find that the claims are not barred by res judicata and collateral estoppel.

First, on the Statute of Limitations question, the Defendants take issue with the fact that Plaintiffs do not specify the time period encompassed by the complaint. They state that various bills attached as exhibits to the complaint cover services provided during the period of January 8th through 2016 and that because civil RICO claims are subject to a four-year Statute of Limitations period, any claims based on conduct prior to April 2012, which is the date the complaint was filed, are thus time barred -- four years from the date the complaint was filed are thus time-barred. In RICO cases, the Second Circuit has made clear, I'm now quoting from Koch v. Christie's International PLC, 699 F.3d 141 at 148 and 49 (2d Circuit 2012), {quote} "The first step in the Statute of

Limitations analysis is determined when the Plaintiff sustained the alleged injury which the Plaintiff seeks redress. The Court then determines when the Plaintiff discovered or should have discovered the injury and begins the four-year Statute of Limitations period at that point" {end of quote}. Generally what is referred to the injury discovery rule applies. Under that rule, {quote} -- again this Koch at page 250 -- "A Plaintiff's action accrues against a Defendant for a specific injury on the date that Plaintiff discovers or should have discovered that injury." Also applicable in RICO cases is the concept of inquiry notice under which, {quote} "Where the circumstances are such as to suggest to a person of ordinary intelligence that the probability that he has been defrauded" {end of quote} that person has a {quote} "duty if inquiry and if he omits that inquiry when it would have developed the truth and shut his eyes to the facts which call for an investigation, knowledge of the fraud will be imputed to him." That's end of quote from Armstrong v. Mcalpin, 699 F.2d 79 at 88 (2d Circuit 1983), and Koch at page 152 affirming the validity of the inquiry notice rule in the civil RICO context. The circumstances giving rise to the duty of inquiry are referred to in the case law as {quote, unquote} "storm warnings."

Turning to the Statute of Limitations rule and under New York Law, actions based upon fraud must be commenced within

the greater of six years from the date the cause of action accrued, or two years from the time the Plaintiff discovered the fraud or couldn't, with reasonable diligence, have discovered it. That's quoting from Section 213 Subsection 8 of the New York CPLR. New York law also recognizes {quote} "that a Plaintiff may be put on inquiry notice which can trigger the running of the Statute of Limitations if the Plaintiff does not pursue a reasonable investigation" {end of quote}. That's again, the Second Circuit in Koch at page 55, citing New York Law. The Second Circuit noted in that case that New York Courts will not grant a Motion to Dismiss a fraud claim where the Plaintiff's knowledge is disputed.

Applying that standard to the instant case, the Defense argued that the Statute of Limitations should not be deemed to have tolled because there were {quote, unquote} "storm warnings" that should have prompted exploration of the alleged fraud. In making this argument, Defendants reference the fact that Plaintiffs had the necessary paperwork and access to the no-fault verification procedures and therefore were able to learn about the alleged fraudulent conduct at the time the invoices were submitted. Plaintiff responds with three points: First, that the Eastern Island Defendant purposely withheld documents during the verification process, limiting their ability to learn about the allegedly fraudulent conduct; Two, that Plaintiff was entitled to rely upon the {quote,

unquote} "facially valid insurance claims authorized by physicians and submitted by a medical services corporation" {end of quote} and could not have detected the fraudulent nature of the thousands of claims at issue during the limited {quote} "opportunity to scrutinize and investigate the propriety of apparently legitimate claims for reimbursement" {end of quote}, citing the case Halima, 2009 U.S. District Lexis 22443 at page 15.

Plaintiffs also argue, third, that this question raises a fact intensive issue that cannot be decided at the Motion to Dismiss stage, citing one of my prior written decisions in Sky Medical Supply, Inc., 17 F.Supp.3d 207 at 222 (E.D.N.Y. 2014). Plaintiff cites to analogous cases in which Courts have reached this conclusion, including the Sky Medical decision, as well as Allstate Company v. Lions, 843 F.Supp.2d 358, (E.D.N.Y. 2012), State Farm Mutual Auto Insurance Company v. CPT Medical Services, PC, 2008 U.S. District Lexis 71156 at page 32 (E.D.N.Y. September 3, 2008) and SEC v. Alexander, 248 F.R.D. 108 at 120 (E.D.N.Y. 2007).

I denied the Defendant's Motion to Dismiss on grounds of Statute of Limitations because I conclude that it can't be decided at this juncture. Obviously this is without prejudice to bring this application at a future time in the litigation after discovery has been had on that issue.

Plaintiff alleges that Defense acts prevented it from

discovering the fraud it alleges, that's in the complaint at paragraph 1061, 1092, 1125, 1158 and 1191. In particular, and among other things, I'm only giving a couple of examples, Plaintiff alleges that Defendants fraudulently transmitted treatment records, invoices, hundreds of bills and other insurance claim documents that indicated Defendant Eastern Island was eligible to collect no-fault benefits under New York Law; that's paragraphs 14 and 23. According to the complaint, these documents included certification that Eastern Island's requests for payment were not materially false, misleading or fraudulent; that's paragraphs 72 through 74, paragraph 193, paragraph 1040 and 41. Plaintiff alleges that this, coupled with the fact that is {quote} "under statutory and contractual obligation to promptly and fairly process claims within 30 days" {end of quote} led Plaintiff to rely on the fraudulent documents; that's paragraph 1047. Accepting these allegations as true and drawing all reasonable inferences in the Plaintiff's favor, it's plausible that if all of this is proven that Plaintiff could prove that it did not discover the injury until after 2012 and that the applicable Statute of Limitations would then not bar this action.

Turning to the storm warning arguments raised by the Defendants, again, I don't think this can be decided based upon the pleading. There is no indication from the complaint

that there were any such warnings. Defendants themselves did not point to any but instead stated that Plaintiff had the necessary paperwork and access to the no-fault verification procedures so that it was able to learn about the alleged fraudulent conduct at the time the invoices were submitted. On this point, the Court notes that Plaintiff has alleged that it relied on Defendant's own fraudulently -- allegedly fraudulent verification forms, and this can't be determined at the Motion to Dismiss stage. But even accepting Defendants' statement that Plaintiff had access to the verification procedures and could have learned about the alleged fraudulent conduct, again, I believe that this type of factual question can't be resolved at this stage because being in a position to know about fraudulent conduct is not necessarily sufficient to suggest that a person of ordinary intelligence a probability that he has been defrauded, and I don't believe the storm warnings exception to the discovery rule can be decided based simply on the pleadings and any documents the Court can take judicial notice of.

In making this decision, I followed similar decisions that have concluded that when Plaintiffs' allegations make it plausible that Plaintiff could not discover the alleged fraud within the applicable Statute of Limitations, it's not appropriate to decide that the actions barred by the Statute of Limitations at this stage of the litigation. These include

State Farm Mutual Auto Insurance Company v. Ravener, 749 F.Supp.2d 94 at 104 (E.D.N.Y. 2010), finding that in light of Plaintiffs' allegations, it's plausible that Plaintiff could not discovery Defendants' fraudulent acts until sometime after the actual injury occurred and declined to make a fact intensive determination of when the fraud could reasonably have been discovered without discovery. The Court reached the same conclusion in State Farm Mutual Auto Insurance Company v. Accurate Medical PC, 2007 Westlaw 2908205 at page 2 (E.D.N.Y. October 4, 2007).

On a related note, for this reason, I also reject the Luna Defendants' additional argument that Plaintiffs' assertion that they only recently discovered the basis for the RICO claims against the Luna Defendants makes it therefore implausible that they could rely on the discovery rule. Again, the Court accepts as true all the allegations set forth in the complaint, draws all reasonable inferences in Plaintiffs' favor, and can't conclude that any statement like that would be sufficient to undermine the allegations contained in the pleadings.

I also reject the Luna Defendants' argument the complaint if flawed because it does not contain the precise date on which the Plaintiff discovered it's injury. As I noted, this is a fact intensive inquiry and it will only be appropriate to reach the question of when the Plaintiff discovered the injury

as the question of when the Plaintiff should have discovered the injury once discovery is complete.

Finally, the Luna Defendants alleged that the common law fraud and unjust enrichment claims against them must be dismissed in light of the six-year Statute of Limitations period applicable to those actions under New York law, but for the same reasons, in light of the congruencies between New York law and Federal law on this point, I deny the motion on this ground as well.

Moving to the issue of the dissolution of the Luna Defendants, the Luna Defendants argue that even setting aside their Statute of Limitations arguments, the complaint fails to allege that they were actually in business during the relevant time period and should accordingly be dismissed under Rule 12(b)(6). In support of their argument on this ground, the Luna Defendants submitted an affidavit of Gary Stein to confirm that Luna ceased doing business in December of 2012 -- excuse me, 2005 and that Vista ceased doing business in December of 2006, leaving any acts alleged by Plaintiffs to have taken place after those dates cannot be attributable to them.

As a threshold matter, Plaintiffs contend the Court should not consider the Stein affidavit. I've reviewed the Stein affidavit. I've determined that its contents fall into one of two categories; either it can be considered by the Court in deciding a Motion to Dimiss, but it's irrelevant or

not dispositive on the legal question at issue at this stage, or it is relevant but it can't be considered by the Court because it's a matter outside the pleadings. In particular, I determined that the portions of the affidavit describing when the Luna Defendants were incorporated and when they were dissolved contained in paragraphs 2 through 6 of the affidavit can be something the Court can take judicial notice of, see In Re: Merrill Lynch and Company, 273 F.Supp.2d 351 at page 356 and 57 (S.D.N.Y. 2003). Specifically Stein's assertions as to the dates of Luna Defendants' incorporation and the dates they resolved by proclamation of the New York Secretary of State are things that can be considered, take judicial notice of. Here, the sources are the certifications provided by the Secretary of State and attached to the Stein affidavit as exhibits. However, these dates are not dispositive as to whether the complaint survives a Motion to Dismiss because the time period issue in the complaint is included within the respective incorporation and dissolution dates, at least partially. Thus, the Court does not believe that this is sufficient to support the Motion to Dismiss.

The remaining facts set forth in the affidavit which pertain to Stein's various roles in the two companies and when they ceased doing business, as more of a practical matter, do not fall into the same category. I reached this conclusion because I can not accurately determine them based on sources

whose accuracy cannot reasonably be questioned. They don't meet any of the exceptions set forth in the Rules of Evidence for things that the Court can consider at this stage, the Motion to Dismiss stage. So although certainly some of that information would be relevant, I cannot consider them on a Motion to Dismiss.

I also decline, in my discretion, to convert the instant motion into a Summary Judgment Motion in order to consider those portions of the affidavit because I believe, as a matter of discretion, the Plaintiffs should get full discovery on this issue, including the ability to question Mr. Stein regarding those before they would have to respond.

Turning to the -- in summary, having considered the issue of Vista and Luna being dissolved in 2010 and 2012, I don't believe this is a basis, in and of itself, to dismiss the Plaintiffs' complaint because allegations, as I say, encompass a time period beginning in 2008. It's just not clear from the pleadings whether information the Court can consider that this can be decided at this stage. So I'm denying the motion on this ground as well.

I'm now going to address the contention that Plaintiffs failed to set forth a precise time period of the alleged violations by them and that this is fatal to their RICO claims. For reasons I'll explain, I'm denying the Motion to Dismiss on this ground, which I refer to as the lack of

specificity ground. First with respect to particularity, allegations of fraud normally must be pleaded with particularity; that's obviously Rule 9(b), where, like here, fraud allegations constitute the predicate acts for RICO. The particularity requirement applies and is, of course, applies with respect to common law fraud claims as well. To satisfy the requirements of Rule 9(b), a Plaintiff should specify the time, place and content of the alleged false representation and describe with particularity any alleged fraudulent transaction and how the particular mailing or transaction furthered the fraudulent scheme, Zerman v. Ball, 735 F.2d 15 at 22 (2d Circuit 1984). However, a complaint's use of general references to misrepresentations without offering the time at which those misrepresentations occurred does not always warrant dismissal for failure to state a claim, see, for example, Protter v. Nathan's Famous Systems, Inc., 904 F.Supp.101 at 106 (E.D.N.Y. 1995).

In deciding whether a complaint has stated a cause of action based on fraud with sufficient particularity, the overarching goals are, 1) to provide Defendant with fair notice of a Plaintiff's claim, 2) to safeguard a Defendant's reputation from improvident charges of wrongdoing, and 3) to protect the Defendant against the an institution of a strike suit. That's set for in the United States ex rel Ladas v. Exelis, Inc., 824 F.3d 16 at 25 and 26 (2d Circuit 2016).

Applying that law here, Plaintiff's RICO and common law fraud claims I believe satisfy Rule 9(b)'s requirements. Although the complaint does not set forth the time of every potential transaction covered by the allegation it sets forth, it does identify the types of transactions at issue and the particular individuals who it alleges committed the wrongdoing at issue, as well as provides a series of examples of transactions that are dated and identified by claim number, service, and billing amount, that's complaint at paragraph 424.

Further, in setting forth it's allegations, the complaint identifies certain events, the approximate dates of which can be assumed to be known to the Defendants, such as the opening of Eastern Island, that's at paragraph 112, the organization and registration of various entities on the same day, paragraph 119, and the hiring of Defendant Scott Roteman, paragraph 264, which also serves to put Defendants, in addition to the other allegations, on notice as to the time period at issue.

Put simply, I don't believe the Defendants could read the complaint and argue that they're completely unaware of which transactions or conduct are at issue here. In providing such particularity in its allegations, Plaintiff has satisfied the overarching goals of Rule 9(b). It does contain the particulars outlined in Rule 9(b) certainly as to the examples that are given, and certainly the remainder of the complaint

satisfies the goals of 9(b), and I don't believe dismissal on this ground is warranted under the circumstances of this case.

Moving to the RICO claim of distinctiveness. Eastern Island Defendants also argue for dismissal of the RICO claims because they fail to meet the distinctiveness element of the enterprise test. Specifically, they assert that the complaint is flawed because it means each Defendant is a participant in an enterprise and pleas in the alternative, choosing various of the corporate entities as the enterprise. As such, the Defendants' argument the RICO claim allege identical conduct that purportedly defrauded Plaintiff into making payments to Eastern Island, which were then funneled to the main Defendant in the cause of action. In response, Plaintiff argues that it satisfied RICO's distinctiveness requirement because it has tailored each of its RICO counts, alleging each of the enterprises played a separate role in the scheme and alleging how each enterprise was utilized to further the scheme's objectives through distinct means.

I find that the Plaintiff has set forth allegations that plausibly satisfy the distinctiveness requirement as explained in the United States v. Private Sanitation Industry Association, 743 F.Supp.114 at 1127 (E.D.N.Y. 1992). "The relevant inquiry in determining whether distinctiveness is met is whether an entity named as an enterprise is also named as a person that conducted the affairs of itself as an enterprise

through a pattern of racketeering activity" {end of quote}. Because Plaintiff does not allege that the person and the enterprise and its various RICO enterprises are the same entity but provides pleadings in the alternative, which is certainly permitted, naming different entities as enterprises and alleges different persons conducted the affairs of the enterprise, it has articulated a plausible claim, even if pled in the alternative that it includes the distinctiveness requirement under RICO. So I deny the Eastern Island Defendants' motion on this ground as well.

Turning to the res judicata and collateral estoppel arguments, Eastern Defendants argue that Plaintiffs' RICO and fraud claims premised upon violation of New York's licensing requirements are barred by res judicata and collateral estoppel because Plaintiff raised the issue of Eastern Island's licensure as a defense to numerous arbitrations with Eastern Island. In their brief and at oral argument, Eastern Island acknowledged that no arbitrator had actually explicitly ruled on the issue. Instead, they argued that Plaintiff failed to prove that the Eastern Island's licensure issue was a defense in those arbitrations and that at least one arbitrator implicitly found that Eastern Island was not fraudulently formed and controlled. That's on page 14 of their brief. Plaintiff responds that, 1) an arbitrator never decided the issue of whether Eastern Island was unlawfully

operating and controlled by non-physicians, 2) Plaintiff did not raise a defense of fraudulent incorporation during arbitrations between itself and Eastern Island, including the arbitration referenced by Eastern Island, and 3) Plaintiff did not have a full and fair opportunity to litigate the issue of Eastern Island's alleged unlawful control by non-physicians at any arbitration.

Applying the applicable standard governing collateral estoppel as set forth in one of my recent decisions, Schiff v. SCO, Joanne Stevens 16-CV-3598 (E.D.N.Y. January 6, 2007). In particular in that decision I noted that collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be again litigated between the same parties in any future lawsuit, Leather v. Eyck, 180 F.3d 420 at 424 (2d Circuit 1999). I further note that the parties seeking the benefit of collateral estoppel bears the burden of proving the identity of the issues which the party -- excuse me, while the party challenging its application bears the burden of showing that he or she did not have a full and fair opportunity to adjudicate the claims involving those issues, Khandhar v. Elfenbein, 943 F.2d 244 at 247 (2d Circuit 1991).

As to the second element, full and fair opportunity to litigate, Courts consider a number of factors, including the nature of the form and the importance of the claim in the

prior litigation, the incentive and initiative to litigate and the actual extent of the litigation, the competence and expertise of counsel, the availability of new evidence, the differences in the applicable law, and the forseeability of future litigation. That's Goodson v. Sedlack, 212 F.Supp.2d 255 at 257 (S.D.N.Y. 2002) quoting New York law.

Concerning res judicata, I note in that prior decision of mine that under that doctrine, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action, not just those that were actually litigated, Flaherty v. Lang, 199 F.3d 607 at 612 (2d Circuit 1999) quoting other cases. "New York Courts apply a transactional analysis of res judicata, barring a later claim arising out of the same factual grouping as an earlier litigated claim, even if that later claim is based on different legal theories or seeks dissimilar or additional relief." That's a quote from Burka v. New York City Transit Authority, 32 F.3d 654 at 657 (2d Circuit 1994) quoting other cases. The doctrine applies only if, 1) the previous action involved an adjudication on the merits, 2) the previous action involved the party against whom res judicata is invoked or those in privity with them, and 3) the claim asserted in the subsequent action were or could have been raised in the prior action, Monahan v. New York City Department of Corrections, 214 F.3d 275 at 285 (2d

Circuit 2000).

In light of the differences between arbitrations and the litigations in Federal Court, whether an arbitrator's decision is entitled to weight and how much weight it is entitled to is a matter of the Court's discretion, Alexander v. Gardner-Denver Company 416 U.S. 36 (1974), McDonald v. City of West Branch, Michigan, 466 U.S. 284, a 1984 case. Applying that standard here, in light of the fact that 1) the issues in the arbitration were focused on payments the Plaintiff had delayed in making and not denied, 2) as Defendant's concede and arbitrator did not expressly rule on the issue of Eastern Island's licensure, 3) Plaintiff did not have the same access to documents, especially those pertaining to Mallela, M-A-L-L-E-L-A, as it may in this lawsuit, and 4) Plaintiff purportedly did not learn of Eastern Island's fraud, which is at issue in this case, until shortly before commencing this action.

As a matter of the Court's discretion, again, based upon the information before me now, I don't believe the doctrines of res judicata and collateral estoppel apply to this action based upon arbitrations invoked by the Defendants, and I accordingly deny the Motion to Dismiss on this ground.

Finally, on the medical necessity issue, the Eastern Island Defendants also argue for dismissal of the RICO and New York common law fraud causes of action on the ground that Plaintiff's fraud claim does not satisfy RICOs reasonableness

requirement or New York's justifiable reliance requirement. In particular, Defendants argue that Plaintiff made payments for what they allegedly are alleging to be medically unnecessary services, not in reliance of Defendants' alleged fraud, but because Plaintiff already possessed the information and documents, namely bills and treating records, that purportedly demonstrate those services were medically unnecessary.

I join decisions of other Courts -- that have been reached by other Courts and reject this argument at the Motion to Dismiss stage for multiple reasons. First, the Plaintiffs allege that the documents were facially valid. Second, Plaintiff alleges that New York law and it's contract with Eastern Island required it to respond promptly to facially valid claims, limiting its ability to scrutinize documents the Defendants now argue make Plaintiffs reliance unreasonable. And third, merely having the means available to determine that a facially valid document is in fact not valid is not a ground on which to determine, at this stage, based solely on that, that there was reliance on the document or whether any reliance was reasonable. That's a fact intensive inquiry that can't be decided at this stage of the litigation. Other courts reaching the same conclusion: Allstate Insurance Company v. Valley Physical Medical and Rehabilitation, PC, 2009 Westlaw 3245388 at page 3 and 4 (E.D.N.Y. September 30,

2009), Government Employees Insurance Company v. Spectrum Neurology Group, LLC, 2016 U.S. District Lexis 19960 at page 11 (E.D.N.Y. February 17, 2016).

Finally, on the Motion for Preliminary Injunction, first I adopt the standard for preliminary injunction set forth in one of my prior decisions, Grout Shield Distributors, LLC v. Elio E. Salvo, Inc., 824 F.Supp.2d 389 (E.D.N.Y. 2011). In summary, to prevail on a Preliminary Injunction Motion, a party must establish 1) irreparable harm in the absence of the injunction and 2) either a) a likelihood of success on the merits or b) sufficiently serious questions going to the merits to make them a fair ground of litigation and a balance of hardships tipping decidedly in the movant's favor. To establish irreparable harm, Plaintiff must demonstrate an injury that is neither remote nor speculative but actual and imminent; that's from Tucker Anthony Realty Corporation v. Schlesinger, 88 F.2d 969 at 975 (2d Circuit 1989). And I note specifically that a preliminary injunction is not appropriate where monetary damages will serve as adequate compensation. It's well established in that case and many other cases. Plaintiffs request injunctive relief 1) temporarily staying while no-fault arbitrations pending between it and Eastern Island, 2) temporarily staying future no-fault arbitrations initiated by Eastern Island against Allstate and 3) temporarily enjoining Eastern Island from filing or initiating

litigation in State Court relating to patient claims at issue in the instant action. Such relief Plaintiff argues will prohibit the risk of inconsistent judgment, increase efficiency. At oral argument Plaintiff acknowledged that if the Court denied Defendants' preclusion arguments, which it has done, that the Plaintiffs would not satisfy the irreparable harm requirement required for injunctive relief, and having rejected the preclusion arguments based upon the record before the Court, I don't believe that the issues that the Plaintiffs are concerned about here that they've raised demonstrate any irreparable harm or inconsistencies in judgments, and I believe that they can be fully compensated by monetary damages. So for those reasons, I don't believe Plaintiffs have met the irreparable harm requirement, and therefore I do not address the remainder of the requirements with respect to preliminary injunction.

So for those reasons, Defendants' Motions to Dismiss are denied in their entirety and also the Motion for Injunctive Relief is denied.

As I said, obviously this is without prejudice to raise any of these various issues at the summary judgment stage, once discovery has been complete. All right, does anyone have any issues they need to raise with the Court? I apologize, that took much longer than I thought.

MR. KING: This is Richard King for the Plaintiffs.

No thank you, Your Honor.

MR. HARFENIST: None for Eastern Island and Dr. Roteman.

MR. SWIEDLER: None for the Luna Defendants.

MR. LICATESI: None for Dr. Michael Small and Optimum Marketing.

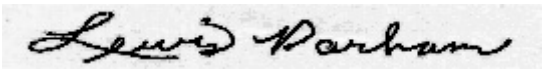
THE COURT: Okay, thank you very much, Counsel, have a good day.

ALL: Thank you.

(Court adjourned)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



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